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The principal case involves a different problem; one in which public opinion will render the ultimate decision. However, with all due deference to proponents of a different view,<sup>7</sup> the position of the court, now expressly indorsed by Congress,<sup>8</sup> seems well fortified by parapets of sound reason. This is no case relating to rights secured to Americans by their Constitution; it concerns the wisdom of permitting one avowedly inimical to American institutions to claim rights and privileges under them. It is but another instance of the traveler and the plane tree, and Esop's principle applies with force undiminished by the lapse of centuries.

Exclusion in such a case is dictated by no base fear of the blighting effect of anarchy upon our own institutions. America has just demonstrated her fearlessness of war, but that fact would not sanction her setting forth, like Gawaine into the enchanted wood, in particular quest of trouble. "By their fruits ye shall know them," and the empirical mind finds much difficulty in establishing identity between the anarchist as idyllically pictured in coat of many virtues, apostle of idealism steeped in human sympathy, and the incarnate anarchist of whatsoever species. And in the case where the idyll is true reflection of the fact the consequence is all too often as Ibañez tells it in "The Shadow of the Cathedral".

Towards anarchistic proselytes already within the gates procedure should indeed be in accordance with the principle that "the best test of truth is the power of the thought to get itself accepted in the competition of the market".<sup>9</sup> For such traders in the particular variety of thought here under consideration, that principle would demand ample opportunity to display their wares. But it should not demand wholesale admission of disciples of any cult, when experience has shown them, either despite or because of their apostolic character, to be, as a class, undesirable additions to American society.<sup>10</sup>

The decision has no force, binding or persuasive, in California, where the provisions of the Syndicalism Act are directed only at advocacy of violence or terrorism.<sup>11</sup>

E. M. P.

CONSTITUTIONAL LAW: THE EIGHTEENTH AMENDMENT: REFERENDUM.—The feeling current in many of the states that the respective legislatures have not been responsive to the public will with respect to the ratification of the eighteenth amendment to the federal Constitution, has led to attempts to refer the matter to the people in those states. In one notable instance, namely, in Washington, such attempt has been successful, and the Supreme Court of that state in the case of *Howell v. State*,<sup>1</sup> has decided that under

<sup>7</sup> See, dealing with this topic and citing some cases, *Deportations and the Law*, an editorial in *The Nation*, Jan. 31, 1920.

<sup>8</sup> In the Act of Oct. 16, 1918, *supra*, n. 1 and n. 4.

<sup>9</sup> Mr. Justice Holmes, dissenting in *Abrams v. United States* (1919) 40 Sup. Ct. Rep. 17, 22.

<sup>10</sup> An article on a different subject, but worth reading in this connection is *The Disloyalty of Socialism*, by Rome G. Brown, 53 *American Law Review*, 681 (Sept.-Oct. 1919).

<sup>11</sup> *Supra*, n. 6.

<sup>1</sup> (May 24, 1919) 181 Pac. 920.

the state constitution, providing that, with certain exceptions in the case of emergency measures, a referendum may be ordered on "any act, item, bill, section or part of any bill, act or law passed by the legislature,"<sup>2</sup> a resolution of the state legislature ratifying an amendment to the federal Constitution may, in like manner, be referred to the people.

This proposition naturally resolves itself into two questions: (1) Does the referendum provision of the state constitution include a joint resolution of the legislature? (2) If so, does it contravene the fifth article of the federal Constitution<sup>3</sup> in so far as it purports to apply to a resolution ratifying an amendment to that instrument?

It is true that the mere wording of the proceeding in the legislature is not the determining factor. A law may be none the less a law for being called a resolution; but as ordinarily used the two words have an entirely distinct and independent meaning.<sup>4</sup> A law has the sanction of the state behind it and directly governs the conduct of the individual. A resolution may be a law, but the word also includes many acts which do not and cannot have the force of law, as for example, a resolution endorsing the League of Nations. Similarly, the word "act" may be used in two senses. In a general sense, anything done is an act; but in legislation, the word "act" has a precise and definite meaning, and as thus used an act is a statute or law made by a legislative body.<sup>5</sup> Thus it would seem that the same reasoning would apply in this connection whether the referendum provision of the particular state constitution contained the word "act" or the word "law," or both.<sup>6</sup>

In view of this, it has been held that a resolution of the legislature which is a mere ministerial act cannot be referred to the people under the referendum provision<sup>7</sup> in the California Constitution.<sup>8</sup> And in a recent Oregon case,<sup>9</sup> the court came to the conclusion that under their referendum provision,<sup>10</sup> a resolution of

<sup>2</sup> Art. II, § 1 (Amendment 7) Washington Constitution.

<sup>3</sup> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; . . ."

<sup>4</sup> *State v. Delesdenier* (1851) 7 Tex. 76.

<sup>5</sup> 1 Words and Phrases, 117.

<sup>6</sup> *People v. Lawrence* (1862) 36 Barb. 177 (N. Y.); *People v. Tiphaine* (1856) 3 Parker Crim. Rep. 241 (N. Y.).

<sup>7</sup> Cal. Const., Art. IV, § 1. This section apparently uses the words "act" and "law" indiscriminately and interchangeably.

<sup>8</sup> *Hopping v. Council of City of Richmond* (1915) 170 Cal. 605, 150 Pac. 977.

<sup>9</sup> *Herbring v. Brown* (1919) 180 Pac. 328.

<sup>10</sup> "The legislative authority of the state shall be vested in a legislative assembly, . . . but the people reserve power at their own option to approve or reject at the polls any act of the legislative assembly." Art. IV, § 1, Oregon Constitution. The word "law" is not used in the Oregon provision, though the title of Art. IV, § 1a, is "Initiative and Referendum on Local, Special and Municipal Laws, and Parts of Laws".

the legislature ratifying the eighteenth amendment could not be referred to the people. It would seem that the Oregon case is sound; it is not the eighteenth amendment, which is undoubtedly a "law" (the supreme law of the land) when ratified as provided by the federal Constitution, that is to be referred to the people, as the court in the principal case seems to think, but the mere casting of a vote of the state for the adoption of that amendment. The latter is a mere ministerial act, required by the federal Constitution if an amendment to that instrument is to be ratified, differing, as we have seen, from a "law" or "act."

But the main question in this connection is the second one. For not only might the state constitution have included the word "resolution" in its referendum provision, but the interpretation of a state constitution by the highest court of that state is ordinarily conclusive; and we can question it only when it seems to conflict with the federal Constitution. In the case mentioned above, the Oregon court having decided the first question in the negative, namely, that a resolution was not an "act," was not called upon to decide whether or not Article V of the federal Constitution allowed state referendum of an amendment to that instrument. But the court in the principal case, having decided that a resolution was a "law" within the meaning of the referendum provision of the state constitution, was forced to face the second question squarely. And that court concluded that "legislatures" as used in the fifth article of the federal Constitution meant the legislative power of the state, not merely the body of elected representatives ordinarily designated as the legislature; and that while the framers of the Constitution might then have had in mind the elected assemblies of the states, still they contemplated a possible change in state governments, making the people directly the law making power.

No one can read the debates of the federal constitutional convention without at once realizing that the delegates did not intend to leave the question of amending the Constitution to a direct vote of the people, and that the word "legislatures" in Article V did not mean the legislative power of the states.<sup>11</sup> It is true that the authors of the Constitution were not unmindful of a possible change in the form of state governments.<sup>12</sup> However, they provided for such a contingency in the very article under discussion,<sup>13</sup> Article V, and the only way in which an amendment to the federal Constitution could be ratified in any manner other than that prescribed therein, would be under a new method adopted in the same manner as any other amendment.<sup>14</sup> The several states in adopting

<sup>11</sup> Farrand, *The Records of the Federal Convention*, pp. 159, 467, 558.

<sup>12</sup> *Idem* at p. 558.

<sup>13</sup> *Supra*, n. 3.

<sup>14</sup> Though a state legislature may reconsider its rejection of a proposed amendment and ratify it at any time before ratification by three-fourths of the states, once it has ratified the amendment, the federal authorities consider the ratification final and not subject to reconsideration by the legislature. 1 Willoughby on the Constitution, 521, 522.

the federal Constitution agreed to be bound by it,<sup>15</sup> and are as much controlled by Article V as by any other provision.

Recognizing this principle, the Supreme Court of Maine in an opinion<sup>16</sup> rendered since that in the principal case, has held that the question is not one to be decided by the states, but is entirely governed by the federal Constitution, that "legislatures" as used in Article V means the legislatures and not the legislative power of the respective states. It must be admitted that under Article I, section 4 of the federal Constitution, providing that the times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislatures thereof, subject to alteration of such regulations by Congress, an act passed by the legislature of a state, dividing it into congressional districts and providing for the election of representatives to Congress therefrom, may be referred to the people of the state.<sup>17</sup> But as pointed out by Justice Parker, in a vigorous dissenting opinion in the principal case, there is a marked distinction between the legislative power reserved in Article I, section 4, and that reserved in Article V. "The former is the enactment of law, the prescription of a rule of conduct by the sovereign legislative power of the state, subject of course to be superseded by laws which may be enacted by Congress, but nevertheless within itself an act of legislation, completed or to be completed by the sole legislative power of the state; . . . . The latter is but the casting of the vote of the state and its people upon the question of amending the Constitution of the United States in the manner provided for by the terms of that instrument—a question not of state legislation but of national legislation in which each state has but one vote."

H. S. J.

DEEDS: RESTRICTION ON ALIENATION AND USE OF PROPERTY: PROHIBITION OF SALE TO JAPANESE OR NEGROES.—In the case of *Title Insurance Company v. Garrott*,<sup>1</sup> it was held that a provision in a deed stipulating that if the grantee leased or sold any portion of the premises to any person of African, Chinese or Japanese descent before January 1, 1925, the title should revert to the grantor or his heirs, was void as a restraint on alienation repugnant to the interest created under section 711 of the Civil Code.<sup>2</sup>

It is, of course, past dispute that a total restraint on alienation in a deed purporting to convey a fee simple is void,<sup>3</sup> but as far as

<sup>15</sup> *Dodge v. Wolsey* (1855) 18 How. 331, 15 L. Ed. 401.

<sup>16</sup> *In re Opinion of the Justices* (1919) 107 Atl. 673.

<sup>17</sup> *Davis v. Hildebrant* (1915) 241 U. S. 565, 60 L. Ed. 1172, 36 Sup. Ct. Rep. 708; *State v. Polley* (1910) 36 S. D. 5, 127 N. W. 848.

<sup>1</sup> (July 10, 1919) 29 Cal. App. Dec. 200, 183 Pac. 470.

<sup>2</sup> "Conditions restraining alienation when repugnant to the interest created are void."

<sup>3</sup> *John Chipman Gray, Restraints on Alienation of Property* §§ 13, 23.